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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

IN RE: ONTOS, INC.
Debtor

T. MARK MORLEY and THOMAS J. MCCOY
Petitioners

v.

ONTOS, INC.; JOSEPH G. BUTLER, as Chapter 7 trustee of the estate of Ontos, Inc.; FIRESTAR SOFTWARE, INC.; KENNETHLORD; AMPHION VENTURES; ROBERT J. BERTOLDI;RICHARD C.E. MORGAN; VENNWORKS, LLC, JOHN FITZGERALD, Trustee.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

In June 2002, Petitioners commenced an action in Massachusetts Superior Court which alleged causes of action for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Violation of the Massachusetts Wage Act M.G.L. c. 149, Section 148, Fraudulent Conveyance, Fraud and Deceit, and Alter Ego against the Ontos, Inc. the Debtor, and its directors and others in control of the company and claimed a jury trial.

Ontos, Inc. filed a voluntary petition seeking relief under Chapter 7 of the United States Bankruptcy code in October 2004.

The bankruptcy court granted a motion by Morley and McCoy to proceed against the non-debtor third party Respondents in respect to claims related to the Wage Act. The trustee, on March 11, 2005, filed Motion by the Trustee for Approval of Stipulation which would seek to cut off the Petitioners ability to pursue their creditor causes of action, including, among others, fraudulent conveyance, after the bankruptcy case was closed. Petitioners filed an Objection to the Trustee's Motion and a separate Motion to Proceed against the non-debtor third party Respondents. The bankruptcy court allowed the trustee's motion and denied the Petitioners' Objection and Motion. Petitioners appealed to the Massachusetts District Court, which affirmed, and then to the First Circuit Court of Appeals which affirmed in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007)

Whether, the First Circuit decision in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) is correct in holding that the Petitioners "are incorrect to assert that they have a cause of action for fraudulent conveyance that is separate from the trustee's cause of action", or whether

the Fourth Circuit decision in *Fed. Deposit Ins. Corp. v. Davis*, 733 F.2d 1083 (4th Cir.1984), the Sixth Circuit decision in *Hatchett v. United States* 330 F.3d 875 (6th Cir.2003, *certiorari denied by* 541 U.S. 1029 (2004) the Seventh Circuit decision in *Klingman v. Levinson*, 114 F.3d 620 (7th Cir.1997), and the Ninth Circuit decision in *Kathy B. Enter., Inc. v. United States*, 779 F.2d 1413, (9th Cir.1986) are correct in holding that once a bankruptcy case has been closed, creditors having unsatisfied and undischarged claims on fraudulently conveyed property can pursue their state law remedies independently of the trustee in bankruptcy.

Whether the First Circuit decision, in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) was correct in affirming the bankruptcy court's power to bar creditor claims via a non-debtor release against alter egos and/or successors in liability for all creditor claims, including claims against non-debtor third parties for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Fraud and Deceit or whether the decisions in Second Circuit *In re: Metromedia Fiber Network Inc.* No. 04-2112-bk (Fed. 2nd Cir. 7/21/2005), the Fifth Circuit decision in *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Sixth Circuit decision in, *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, (6th Cir. 2002), *certiorari denied by,* 537 U.S. 816 (2002), the Ninth Circuit decision in *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, F.3d 1394, (9th Cir. 1995), and the Tenth Circuit decision in *Landsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, (10th Cir. 1990) (per curiam) are correct in holding that non-debtor third party releases are a) allowable only in unusual circumstances, or b) only in asbestos cases, or c) never.

Whether the, the First Circuit decision in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) is correct in affirming the bankruptcy court's jurisdiction and allowance of the Trustee's Motion barring state-law based creditor claims against alter egos and/or successors in liability, including claims against non-debtor third parties for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Fraudulent Conveyance and Fraud and Deceit, as "core proceedings" or whether and the Third Circuit decision in *Stoe v. Flaherty*, 436 F.3d 209 (3rd Cir., 2006), the Fifth Circuit decision in *Matter of Wood,* 825 F.2d 90 (5 Cir. 1987), the Ninth Circuit decision in *Dunmore v. United States*, No. 02-15789 (9th Cir. 1/29/2004) (9th Cir., 2004), and the Eleventh Circuit decision in *In re Toledo*, 170 F.3d 1340 (11 Cir., 1999) which hold that state based claims to be "non-core" proceedings if they do not depend on the Bankruptcy Code for their existence and they could proceed in another court.

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PETITION FOR WRIT OF CERTORARI

T. Mark Morley and Thomas J .McCoy respectfully petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered on March 1, 2007, in order to resolve a conflict between the First Circuit, which held in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) that a claimant under a state fraudulent conveyance statute is incorrect to assert that they have a cause of action for fraudulent conveyance that is separate from the trustee's cause of action, and the decisions in the Fourth Circuit decision in *Fed. Deposit Ins. Corp. v. Davis*, 733 F.2d 1083, (4th Cir.1984), the Sixth Circuit decision in *Hatchett v. United States* 330 F.3d 875 (6th Cir.2003, *certiorari denied by* 541 U.S. 1029 (2004), the Seventh Circuit decision in *Klingman v. Levinson*, 114 F.3d 620 (7th Cir.1997), and the Ninth Circuit decision in *Kathy B. Enter., Inc. v. United States*, 779 F.2d 1413, (9th Cir.1986) which hold that once a bankruptcy case has been closed, creditors having claims on fraudulently conveyed property can pursue their state law remedies independently of the trustee in bankruptcy. The Court is presented with a conflict between the circuits and the court should reverse the First Circuit's decision on this issue.

Additionally, Messrs. Morley and McCoy, respectfully petition that the Writ of Certiorari be issued to in order to resolve a conflict between the First Circuit, in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) affirming the district court which affirmed the bankruptcy court's jurisdiction under 28 U.S.C. § 157 and power to bar claims via a non-debtor release against alter egos and/or successors in liability for creditor claims, including claims against non-debtor third parties for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and

Fraud and Deceit, and the decisions in Second Circuit *In re: Metromedia Fiber Network Inc.* No. 04-2112-bk (Fed. 2nd Cir. 7/21/2005), the fifth circuit decision in *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Sixth Circuit decision in, *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, (6th Cir. 2002), *certiorari denied by,* 537 U.S. 816 (2002),the Ninth Circuit decision in *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, F.3d 1394, (9th Cir. 1995), and the Tenth Circuit decision in *Landsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, (10th Cir. 1990) (per curiam), which hold that non-debtor third party releases are a) allowable only in unusual circumstances, or b) only in asbestos cases, or c) never. The Court is presented with a conflict between the circuits and the court should reverse the First Circuit's decision on this issue.

Additionally, Messrs. Morley and McCoy, respectfully petition that the Writ of Certiorari be issued to in order to resolve a conflict between the First Circuit, in *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) affirming the district court which affirmed the bankruptcy court's jurisdiction under 28 U.S.C.§157 and power to bar claims as "core proceedings" as "arising under" the Bankruptcy Code against alter ego and/or successors in liability for claims against third parties for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Fraudulent Conveyance and Fraud and Deceit and the Third Circuit decision in *Stoe v. Flaherty*, 436 F.3d 209 (3rd Cir., 2006), the Fifth Circuit decision in *Matter of Wood,* 825 F.2d 90 (5 Cir. 1987), the Ninth Circuit decision in *Delamore v. United States*, No. 02-15789 (9th Cir. 1/29/2004) (9th Cir., 2004), and the Eleventh Circuit decision in *In re Toledo*, 170 F.3d 1340 (11 Cir., 1999) which hold thatstate based claims to be "non-core" proceedings if they do not depend on the Bankruptcy Code for their existence and they could proceed in another court.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals dated March 1, 2007 is reported as *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) The order and memorandum and of the district court affirming the bankruptcy court are dated February 3, 2006 and are not reported. The order of the bankruptcy court is dated June 29, 2005 and is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 1, 2007. A Petition for Rehearing was timely filed and was denied on March 19, 2007. Pursuant to Supreme Court Rule 13.1, this petition has been filed with in 90 days of the denial of the rehearing. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the Massachusetts Bankruptcy Court, the court of the first instance, was pursuant to 28 U.S.C. 157.

Copies of this petition have been served on the Solicitor General of the United States.

STATEMENT

The case commenced with a Massachusetts state court case filed against Ontos, Inc. and the solvent non-debtor third parties, VennWorks, LLC. Amphion Ventures, Firestar Software, Inc., Robert J. Bertoldi, Richard C. E. Morgan and Kenneth Lord. ("VennWorks Group") who owned and controlled Ontos. .

In the state action, Petitioners asserted claims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Violation of the Massachusetts Wage Act M.G.L. c. 149, Section 148, Fraudulent Conveyance, Fraud and Deceit, and Alter Ego Liability. The solvent, non-debtor third parties, VennWorks, LLC., Amphion Ventures, Robert J. Bertoldi, Richard C. E. Morgan, and Kenneth Lord, ("VennWorks Group") had stripped Ontos of all assets by selling the assets to themselves via a newly formed sister corporation, Firestar Software, and then using the remaining cash to pay such debts as they saw fit.

The Petitioners pursued the Debtor and the solvent non-debtor third parties in state court. After one and one-half years of litigation in state court, and the day after a court appointed master had ordered the VennWorks Group to produce additional documents, Ontos filed Chapter 7 bankruptcy. The solvent non-debtor third parties, VennWorks Group, have in the Trustee's Motion and Stipulation proposed to pay $50,000 to the estate to purchase a release from suit by the estate and a number of the Petitioners non-bankruptcy claims.

The Petitioners objected in the bankruptcy court to the proposed Trustee's Motion and Stipulation as being too broad, outside of the bankruptcy court's jurisdiction and severely impacting the Petitioners non-bankruptcy state court claims. After denial of their objection by the bankruptcy court, Petitioners appealed to the district court which affirmed and to the circuit court which also affirmed. A timely Petition for rehearing was also denied.

One of the patents, U.S. Patent 6101502, which the VennWorks group sold to themselves/Firestar Softwareis now the subject of a claim by Firestar against Red Hat Software in the United States District Court for the Eastern District of Texas, Case 2:06-cv-00258-TJW, in which they allege infringement and request injunctive relief and damages

This court should now consider the petitioners' claim that they have a separate state law fraudulent conveyance claim that was and remains separate and distinct from the trustee's fraudulent conveyance avoidance power under 11 U.S.C. § 542(b) of the bankruptcy code.

Also, this court should consider the petitioners' objection to the bankruptcy court's approval of a non-debtor release in non-unusual circumstances.

Further, this court should also consider the petitioners' claim that prior existing state law based actions against non-debtor third parties that do not depend on the Bankruptcy Code for their existence and may proceed their existence in another court, are "non-core" proceedings and may not be determined by the bankruptcy court but can only be temporarily stayed pending the closure of the bankruptcy case.

REASONS FOR GRANTING THIS PETITION

A. The First Circuit Court of Appeals decision, *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007), conflicts with the Fourth Circuit decision in *Fed. Deposit Ins. Corp. v. Davis*, *Hatchett v. United States* 330 F.3d 875 (6th Cir.2003, *certiorari denied by* 541 U.S. 1029 (2004), the Seventh Circuit decision in *Klingman v. Levinson*, 114 F.3d 620 (7th Cir.1997), and the Ninth Circuit decision in *Kathy B. Enter., Inc. v. United States*, 779 F.2d 1413, (9th Cir.1986).

There is disagreement amongst the circuit courts of Appeal on whether a preexisting creditor based state law action for fraudulent conveyance may be pursued by the creditors after a bankruptcy case has been closed.

The decision of the Fourth Circuit Court of Appeals in *Fed. Deposit Ins. Corp. v. Davis*, 733 F.2d 1083, (4th Cir.1984), held that once a bankruptcy case was closed, a secured creditor with an unavoided lien on allegedly fraudulently conveyed property could pursue state law remedies independently of trustee in bankruptcy. In finding that the district judge erred in holding that no individual creditor could attack an allegedly fraudulent conveyance independently of the trustee in bankruptcy the court explained that although the unsecured creditors of a bankrupt debtor could not assert the rights granted a trustee under the bankruptcy law, that a creditor with a secured judgment lien could assert its independent state law claim after the bankruptcy case was closed. In that case the trustee did not recover the fraudulently conveyed property debtor. The Fourth Circuit Court of Appeals held that

> "Once a bankruptcy case was closed, a secured creditor with an unavoided lien on allegedly fraudulently conveyed property could pursue state law remedies independently of trustee in bankruptcy."

Id., at 1085

The decision of the Sixth Circuit Court of Appeals in *Hatchett v. United States* 330 F.3d 875 (6th Cir.2003, *certiorari denied by* 541 U.S. 1029 (2004), held thatalthough trustee has the exclusive right to bring an action for fraudulent conveyance during the pendency of a bankruptcy proceedings, the Bankruptcy Code does not extinguish a creditor's right to bring a state law action for fraudulent conveyance after the debtor receives a discharge in bankruptcy. The court explained that although the trustee is given the exclusive authority to pursue a claim of fraudulent conveyance under 11 U.S.C. § 548, the bankruptcy proceeding does not extinguish the creditor's state law based action. In that case the trustee's fraudulent conveyance action was officially abandoned and the matter settled in the bankruptcy court, subsequently the Internal Revenue service asserted a state law based fraudulent conveyance claim. The Sixth Circuit Court of Appeals held

> "As we have discussed, this state law action by the Government for fraudulent conveyance commenced after the discharge of the bankruptcy and has nothing to do with the rights of the trustee."

Id., at 887

The decision of the Seventh Circuit Court of Appeals in *Klingman v. Levinson*, 114 F.3d 620 (7th Cir.1997) held that bankruptcy proceedings only have the effect of imposing a temporary stay of a fraudulent conveyance by the government. The court reasoned that the filing of the

bankruptcy petition did nothing to pretermit the fraudulent conveyance action; although it had the temporary effect of staying that action. In that case the debtor fraudulently conveyed property to a land trust in 1972. The debtor filed for bankruptcy in 1982 and received a discharge in 1985. A judgment creditor and the Internal Revenue Service asserted a fraudulent conveyance action against the individual debtor. The creditor's judgment lien had previously been stipulated as part of an earlier Agreed Judgment Order to be non-dischargeable. The Internal Revenue Service tax lien was not dischargeable in bankruptcy. The Seventh Circuit Court of Appeals held

> "The filing of the bankruptcy petition did nothing to pretermit the fraudulent conveyance action; although it had the temporary effect of staying that action, the bankruptcy court remanded the conveyance action to the district court because it was a non-core proceeding. For the reasons noted above, the bankruptcy court's findings did not preclude the government from litigating the issue here whether the assignment was a fraudulent conveyance, nor did the bankruptcy court proceedings preclude the government from reducing its claim to a monetary judgment."

Id., at 629

The decision of the Ninth Circuit Court of Appeals in Kathy *B. Enter., Inc. v. United States*, 779 F.2d 1413, (9th Cir.1986) held that thatonce bankruptcy proceedings are over, the Internal Revenue Service is able to pursue a fraudulent conveyance based collection action because such collection action would not interfere with rights of other creditors. In that case debtor fraudulently conveyed the assets of his bookkeeping and tax preparation service to another company in 1979. The IRS assessed back taxes in 1980 and the debtor filed for bankruptcy in 1984 and the court granted

him a discharge from the taxes. During the pendency of the bankruptcy, the IRS had attempted to enforce its lien against the assets. The IRS then brought a fraudulent conveyance claim for the back taxes to recover the assets from the transferee.

After finding that the debtor's discharge did not discharge the liability of a transferee holding fraudulently conveyed assets, the court reasoned that because the bankruptcy proceedings were over the IRS's actions were not precluded. The Ninth Circuit Court of Appeals held

> "The bankruptcy proceedings are over. Even if the government's actions did violate the stay, it will be permitted to pursue collection actions now. Moreover, the debtor certainly cannot argue that the IRS's actions outside the bankruptcy proceedings allowed one creditor to "get the jump" on other creditors. If the IRS's collection efforts had undermined the taxpayer's ability to reorder his affairs in bankruptcy peaceably, no doubt someone would have invoked the stay during the two-year course of the litigation below."

Id., at 1415

The decision in the instant case by the First Circuit Court of Appeals, *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir. 2007) sharply disagrees with the decisions in the Fourth, Sixth, Seventh and Ninth circuits in its holding that the Petitioners were incorrect to assert that they have a cause of action for fraudulent conveyance that is separate from the trustee's cause of action.

The decisions in the Fourth, Sixth, Seventh, and Ninth Circuits recognize that a state-based fraudulent conveyance claim is wholly separate and distinct from the trustee's power under 11 U.S.C. § 544 (b) of the Bankruptcy Code and the filing of bankruptcy petition does nothing to pretermit the

state-based fraudulent conveyance action; although it has the temporary effect of staying that action.

B. The First Circuit Court of Appeals decision, In re: Ontos, Inc., No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) conflicts with the Second Circuit decision in In re: Metromedia Fiber Network Inc. No. 04-2112-bk (Fed. 2nd Cir. 7/21/2005), the Fifth Circuit decision in, Matter of Zale Corp., 62 F.3d 746 (5th Cir. 1995), the Sixth Circuit decision Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, (6th Cir. 2002), certiorari denied by, 537 U.S. 816 (2002), and the Ninth Circuit decision in Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, (9th Cir. 1995), (9th Cir. 1995), the Tenth Circuit Court of appeals decision Landsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, (10th Cir. 1990) (per curiam)

There is disagreement amongst the circuit courts of Appeal on whether non-debtor third party releases are authorized by the Bankruptcy Code and if permitted, in what circumstances.

The decision of the Second Circuit in *In re: Metromedia Fiber Network Inc.* No. 04-2112-bk (Fed. 2nd Cir. 7/21/2005) held a non-debtor release in a plan of reorganization should not be approved absent the finding of "truly unusual' circumstances. In this case the appellants' argued that releases in the Plan improperly shield certain nondebtors from suit by the creditors. The Second Circuit Court of Appeals held

> "A nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important

> to success of the plan, focusing on the considerations discussed..."

Id., at 141 citing *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992)

The decision in the Fifth Circuit, *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), involving an injunction against the creditors from bringing actions for bad faith and breach of contract against a non-debtor, CIGNA, held that such injunction could not be made permanent. The Fifth Circuit Court of Appeals held

> "Feld and NUFIC argue that the injunction was improper, contending that the injunction eradicated any liability of CIGNA for contract debts to Feld or NUFIC and therefore violated 11 U.S.C. § 524 of the Bankruptcy Code. 11 U.S.C. § 524 prohibits the discharge of debts of nondebtors. Accordingly, we must overturn a 11 U.S.C. § 105 injunction if it effectively discharges a nondebtor"

Id., at 760

The decision in the Sixth Circuit, *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, (6th Cir. 2002), *certiorari denied by,* 537 U.S. 816 (2002) involving asbestos claims held that an injunction prohibiting creditor claims against non-debtor third parties is a dramatic measure to be used cautiously, and appropriate only in conjunction with a finding of "unusual circumstances.". The Sixth Circuit Court of Appeals held

> "In addition, we AFFIRM the district court's determination that, when there are "unusual circumstances," the bankruptcy court may enjoin non-consenting creditors' claims against a non-debtor to facilitate a Chapter 11 plan of reorganization"

Id., at 663

The Ninth Circuit decision in *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, (9th Cir. 1995), held that 11 U.S.C. 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. The Ninth Circuit Court of Appeals held

> "The bankruptcy court lacks the power to confirm plans of reorganization which do not comply with applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Pursuant to 11 U.S.C. § 524(a), a discharge under Chapter 11 releases the debtor from personal liability for any debts. Section 524 does not, however, provide for the release of third parties from liability; to the contrary, Sec. 524(e) specifically states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).
>
> This court has repeatedly held, without exception, that Sec. 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors."

Id., at 1401 (citations omitted)

The decision *In Landsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, (10th Cir. 1990) (per curiam), which held that while a temporary stay prohibiting a creditor's suit against a nondebtor during the bankruptcy proceeding may be permissible to facilitate the reorganization process in accord with the broad approach to nondebtor stays under 11 U.S.C. § 105(a) the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor. In this case the bankruptcy court attempted to

permanently enjoin a creditor from enforcing his claims against non-debtor third parties. The Tenth Circuit Court of Appeals held

> "Accordingly, we follow the Ninth Circuit's lead *In re American Hardwoods, Inc.*, 885 F.2d 621 and hold that while a temporary stay prohibiting a creditor's suit against a nondebtor (in American Hardwoods, the bankrupt's guarantor) during the bankruptcy proceeding may be permissible to facilitate the reorganization process in accord with the broad approach to nondebtor stays under 11 U.S.C. § 105(a) outlined above, the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor."

Id., at 601

The decision in the instant case by the First Circuit Court of Appeals, *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir. 2007) sharply disagrees with the decisions in the Second, Sixth, Ninth and the Tenth circuits in affirming the bankruptcy court's release of non-debtor third parties in a standard bankruptcy case.

The decisions in the Second, Fifth, Sixth, Ninth and Tenth Circuits recognize that non-debtor third party releases are a) allowable only in truly unusual circumstances, or b) only in asbestos cases, or c) never.

C. The First Circuit Court of Appeals decision, In re: Ontos, Inc., No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007) is in conflict the Third Circuit decision in *Stoe v. Flaherty*, 436 F.3d 209 (3rd Cir., 2006), the Fifth Circuit decision in *Matter of Wood*, 825 F.2d 90 (5 Cir. 1987), the Ninth Circuit decision in *Dunmore v. United States*, No. 02-15789 (9th Cir. 1/29/2004) (9th Cir., 2004), and the Eleventh Circuit decision in *In re Toledo*, 170 F.3d 1340 (11 Cir., 1999)

There is disagreement amongst the Circuit Courts of Appeal on whether state law based contract actions for non-discharged debts against third parties are "core proceedings."

The Third Circuit decision in *Stoe v. Flaherty*, 436 F.3d 209 (3rd Cir., 2006) held that a state-law action in state court to recover unpaid severance benefits from current and former officers of the claimant's previous employer were was not a core proceeding as it did not arise in or arise under the Bankruptcy Code. The court explained that claims that "arise in" a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case. The court citing *Halper v. Halper*, 164 F.3d 830 (3 Cir., 1999) further explained that whether a proceeding is a "core" proceeding that "arises under" title 11 depends upon whether the Bankruptcy Code creates the cause of action or provides the substantive right invoked. The Third Circuit Court of Appeals held

> "Our decision there mandates a conclusion that Stoe's claim is not a "core" proceeding."

Id., at 218

The Fifth Circuit decision in *Matter of Wood* 825 F.2d 90 (5 Cir. 1987) held that a petitioner could not sustain a state law based contract action in the bankruptcy court as the action did not arise in or arise under title 11. The court explained thatif the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under 28 U.S.C. § 157(c)(1) it is an "otherwise related" or non-core proceeding. The Fifth Circuit Court held

> "We hold, therefore, that a proceeding is core under 28 U.S.C. § 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. The proceeding before us does not meet this test and, accordingly, is a non-core proceeding. The plaintiff's suit is not based on any right created by the federal bankruptcy law. It is based on state created rights. 34 Moreover, this suit is not a proceeding that could arise only in the context of a bankruptcy. It is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court."

Id., at 97

The Ninth Circuit decision in *Dunmore v. United States*, No. 02-15789 (9th Cir. 1/29/2004) (9th Cir., 2004), held that the debtor's pre-petition claims for tax refunds were not core proceedings. The court reasoned that although the district court had jurisdiction over all the claims asserted in the bankruptcy court, the bankruptcy court's power to adjudicate the claims varied among Dunmore's claims and when presented with a mixture of core and non-core claims, a claim-by-claim analysis must be employed to determine

whether the bankruptcy court could enter a final order for that claim. The Ninth Circuit held

> "We determine Dunmore's claims to be "non-core" proceedings if they do not depend on the Bankruptcy Code for their existence and they could proceed in another court."

Id., at 12 citing *Sec. Farms v. Int'l Bhd. of Teamsters,* 124 F.3d 999, 1008 (9th Cir. 1997).

The Eleventh Circuit decision in *In re Toledo*, 170 F.3d 1340 (11 Cir., 1999) held that the state court based action to determine the entitlement to the proceeds of a partnership property was a non-core proceeding. The court explained that because the case did not involve a right created only by bankruptcy law, or one which would arise only in bankruptcy and because the case invoked state law rights and could exist outside of bankruptcy it was non-core. The Eleventh Circuit held

> "In conclusion, we hold that there was "related to" jurisdiction over the adversary proceeding under 28 U.S.C. § 1334, but that it was a non-core proceeding under 28 U.S.C. § 157."

Id., at 1350

The Second Circuit decision in *In re Millennium Seacarriers*, Inc., No. 05-5421-bk (2nd Cir. 7/21/2006) (2nd Cir., 2006) enunciated a significantly broader definition of a core proceeding than used by the Third, Fifth, Ninth and Eleventh circuits hereinabove. The Second Circuit Court of Appeals held

> "To determine whether litigation concerning a contractual dispute is a core proceeding, we assess "(!) whether the contract is antecedent to the reorganization petition; and (2) the degree to which

> the proceeding is independent of the reorganization." Id. "Proceedings can be core by virtue of their nature if either (1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings, or (2) the proceedings directly affect a core bankruptcy function."

Id., at 3 (citations omitted)

The decision in the instant case by the First Circuit Court of Appeals, *In re: Ontos, Inc.*, No. 06-1512 (1st Cir. 3/1/2007) (1st Cir. 2007) sharply disagrees with the decisions in the Third, Fifth, Ninth and Eleventh circuits by finding, and affirming that prior-existing state-based causes of action for fraudulent conveyance, fraud and deceit and contractual claims based on alter ego and successor liability are core proceedings. The decisions in the Third, Fifth, Ninth and Eleventh Circuits recognize that creditor state-based claims against third parties are "non-core" proceedings if they do not depend on the Bankruptcy Code for their existence and they could proceed in another court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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